***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

# In The United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED SEP 12 1958
Joseph W. Stewart
CLERK

NO. 14,604

JAMES A. MARSHALL,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

# 125

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Bill Austin Services, Inc.
Printers
Washington, D. C.
EX. 3-8239

# INDEX


| | Record Page | Appendix Page |
|---|---|---|
| Indictment | 1 | 1 |
| Plea of Defendant | 2 | 1 |
| Verdict | 3 | 2 |
| Judgment and Commitment | 4 | 2 |
| Motion to Vacate Judgment; Release Defendant From Custody; Or in the Alternative Grant a New Trial Pursuant to Title 28, Section 2255 | 5 | 3 |
| Denial of Motion | 19 | 12 |
| Excerpts From Transcript Of Proceedings | 26 | 12 |
| Witnesses: | | |
| Louise Jennings | | |
| Direct | 27 | 12 |
| Cross | 29 | 13 |
| Recross | 32 | 13 |
| Further recross (Resumed) | 66 | 25 |
| Thomas Jennings, Jr. | | |
| Direct | 37 | 14 |
| Cross | 41 | 14 |
| Louis B. Peters | | |
| Direct | 43 | 15 |
| Cross | 50 | 17 |
| Kenneth L. Cones | | |
| Cross (Resumed) | 51 | 18 |
| Redirect | 55 | 20 |
| Further Recross | 55 | 20 |
| Further Redirect | 58 | 22 |
| Further Cross | 61 | 24 |
| Further Cross | 64 | 24 |
| Motion to Vacate, Set Aside, or Correct Sentence: Jurisdiction: 28 USC, Section 2255 | 90 | 30 |

# JOINT APPENDIX

1/Filed July 11, 1955/

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled June 2, 1955, Sworn in on June 7, 1955

| | | |
|---|---|---|
| The United States of America | : | Criminal No. 633-'55 |
| v. | : | Grand Jury No. 750-55 |
| Warren E. Moore | : | Housebreaking and Larceny |
| James A. Marshall | : | (22 D.C.C. 1801, 2201, 2202) |

The Grand Jury charges:

On or about June 15, 1955, within the District of Columbia, Warren E. Moore and James A. Marshall entered the apartment of Louise Jennings with intent to steal property of another.

SECOND COUNT:

On or about June 15, 1955, within the District of Columbia, Warren E. Moore and James A. Marshall stole the property of Louise Jennings consisting of one radio-phonograph combination of the value of $75.00

/s/ Leo A. Rover
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ Vernon M. Herring

Foreman.

---

2/Filed July 15, 1955/

PLEA OF DEFENDANT

On this 15th day of July, 1955, the defendants Warren E. Moore and James A. Marshall, appearing in proper person requests counsel be appointed by the Court, which is so ordered, being arraigned in open Court upon the indictment, the substance of the charge being stated, to him, pleads Not Guilty thereto.

The defendants are remanded to the District of Columbia Jail.

By direction of
Bolitha J. Laws
Presiding Judge, Criminal Court #1

Present:

United States Attorney

by E. Fennell
Assistant United States Attorney

E. Markwalter
Official Reporter

HARRY M. HULL, CLERK

By /s/ Richard A. Kane
Deputy Clerk

---

3/Filed September 27, 1955/

The jury retired to consider their verdict. The jury returns into Court and upon their oath say that each defendant is guilty as indicted, and thereupon each and every member of the jury is asked if that is his or her verdict as to each defendant and each and every member thereof says that each defendant is guilty as indicted.

The case is referred to the Probation Officer of the Court and each defendant is remanded to the District of Columbia Jail.

By direction of

F. Dickinson Letts
Presiding Judge, Criminal Court #1

Present:

United States Attorney

By Joel Blackwell
Assistant United States Attorney

E. Sweeney, Official Reporter

HARRY M, HULL, Clerk

By /s/ John C. Coogan
Deputy Clerk

---

4/Filed November 4, 1955/

JUDGMENT AND COMMITMENT

UNITED STATES OF AMERICA :

v. : Criminal No. 633-55

JAMES A. MARSHALL :

On this 4th day of November, 1955, came the attorney for the government and the defendant appeared in person and by his counsel, Albert Rapaport, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of

not guilty and a verdict of guilty of the offense of HOUSEBREAKING AND LARCENY, as charged, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Two (2) Years to Eight (8) Years on count one;

One (1) Year on count two; said sentence by the counts of the indictment to run concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ F. Dickinson Letts
United States District Judge.

---

5/Filed February 13, 1958/

Motion To Vacate Judgment; Release Defendant From Custody; Or In The Alternative Grant A New Trial Pursuant To Title 28, Section 2255.

---

Comes now petitioner, James A. Marshall, in proper person pursuant to the statutes required to invoke jurisdiction in this cause. Petitioner requests the honorable Court to release petitioner from further illegal custody.

The sentence herein impose in United States of America vs. James A. Marshall, Criminal Case No. 633-55, and as cause therefore shows the honorable Court as follows, to wit:

1. That petitioner is a citizen of the United States; and is

2. Over twenty-one years of age; and is

3. Presently confined in the D. C. Reformatory, Fairfax County, Commonwealth of Virginia; and

4. That the jurisdiction of the Honorable Court to issue such process of law, is invoked under due process of law under criminal procedure.

Antidote: In support of this Court's jurisdiction, attention is called to the following:

Jurisdiction

This motion for redress is being submitted pursuant to the provisions of title 28, Section 2255, U. S. Code, Rules 35, 52 of Criminal Procedures the doctrine of stare decisis; and the equitable discretion inherent to the Court. Title 28 U.S.C., Section 2255 states in so far as applicable to this

6 petition which gives the court jurisdiction to entertain said petition, that:

"A person in custody under sentence of a court established by act of Congress."

"A motion for such relief may be made at anytime." Emphasis Supplied: See also, U.S. vs. Hayman, 342 U.S. 205.

The doctrine of judicial precedent - stare decisis:

"Under this doctrine, a judicial decision once rendered becomes a precedent to be followed by all courts in the same jurisdiction in all similar cases which may thereafter arise."

According to Black's Law of Judicial Precedent: J.M.R., cr: N. 133, 8.

"A precedent is an adjudged case or decision of a court of justice, considered as furnishing an example or rule for the determination of an identical or similar case, afterwards arising, between the same or another court on a similar question of law."

Statement of Facts:

On or about September 27, 1955 defendants, James A. Marshall and Warren E. Moore was tried before a jury for violating Title 22, Section 1801, and Title 22, Section 2202.

Presiding was the Honorable F. Dickinson Letts, Judge of the United States District Court for the District of Columbia.

Appearances was entered by Albert Rapaport, Esquire, on behalf of this defendant.

7 The defendant in the instant case was found by the jury to be guilty as charged in indictment.

On or about November 4, 1955, a hearing was had on a motion submitted by defendant's trial attorney, for a new trial. The same being denied on the same date, November 4, 1955.

Thereby, defendant was sentenced to term on the first count of the indictment to imprisonment of from two to eight years, and that one year be imposed on the second count, and sentences to run concurrently.

Reference is made of "errors" in the following statement of facts on which this motion is presently based.

Petitioner will endeavor to show that certain laws and liberties were violated; repugnant to the U. S. Constitution.

In the case at bar, petitioner has been deprived of life and liberty, without due process of law within the meaning of the Fifth Amendment to the Federal Constitution; in that petitioner has been deprived of a fair trial with conceivetions (sic) effective assistance of counsel within the meaning of the Sixth Amendment of the Federal Constitution.

That because of the foregoing the Court was divested of its jurisdiction by operation of law to impose a lawful judgment.

The essentials involved herein is whether or not petitioner was denied a fair trial and effective assistance of counsel guaranteed by the Fifth and Sixth Amendment because of the failure of appointed trial counsel to call all essential witnesses; deprived defendant of a fair trial.

Petitioner alleges, among other things, that trial counsel conspired, suppressed, and concealed evidence prerequisite with the Government attorney's participation, thereby through deception and fraud on the court convicted petitioner.

8 One detective Sullivan, a witness for the Government who never testified, and the testimony from this witness was essential to defendant's trial, i.e., would have shown that he was directly involved in the investigation of this case with Detective Cones. And said Government witness would have shown beyond reasonable doubt that petitioner was not guilty of the crime alleged, i.e., another witness essential to petitioner defense was a eye witness to the

crime alleged and this witness that was concealed and suppressed, was an employee of Uline Ice Company, 3rd & M Sts., N.E., this witness (Henry Goram) testimony would undoubtly resulted in acquittal. This assumption is founded on the following:

During detention of this petitioner at police headquarters under going interrogations, Detective Sullivan confronted petitioner with two witnesses, Mrs. Jennings, the other witness was Henry Goram an employee of Uline Ice Company, whom, at the time the police alleged was a eyewitness who saw (as well as Capt. Peters) two men walking down the street and get in a cab directly in front of the building where he (Henry Goram) works, with a square object, alleged by the police to be the stolen property of Mrs. Jennings. This witness stated in my presence and Detective Sullivan's presence as well, that he could identify the men he saw that particular day. He was asked also, whether or not I, petitioner, was one of the men he saw with the stolen property on the (June 15, 1955) day in question. The witness answered, "I would know the man if I saw him again, but this man here (defendant) is not the one I saw that day."

It is interesting to note, that this witness was essential to my defense, even though they were government witnesses, were never produced by government counsel nor trial counsel. This defendant called trial counsel's attention to these witnesses, to which he replied, "The government will call them sooner or later and its no need for me to do so, if he (government counsel) doesn't call them, then they're not worth calling."

9 Evidence demonstrated by the record (Tr-10 Trial Transcript) will show that one Essie Jennings was introduced as evidence relative to the case in dispute here, in that said government witness, Essie Jennings was not called to testify. Their sinister implications therefrom. And because of such endeavors by trial counsel and Government attorney to conceal, suppress, and conspire, constituted a denial of defendant's right to a fair impartial trial; And the same being against the government, in all probability would have resulted in petitioner's acquital.

Defendant - further complains in his petition of grievance that the principle witness of the Government's one Louise Jennings, was intimadated, tampered, coerced, and forced against her will to testify falsely and the police in the process, did maliciously use abusive language in their efforts to persuade Mrs. Jennings to testify, said witness gave tainted testimony as a result.

The witness, had no other choice, but to do as they, the police, requested. She admitted also in the presence of a witness at the conclusion of petitioner's trial that on several occasions police officers prior to trial, presented themselves at her home to intimadate and force her through fear to appear in court. The reluctance on the part of this principle witness to give tainted testimony, prevented the government from bringing defendant to trial as previously arranged by Judge Laws: There were these continuences procured by the government attorney assisted by trial counsel, Albert Rapaport, to allow for more time, methods concocted for the purpose of persuasion until said witness agreed to do their bidding. The recipient of this evidence or information from the principle witness, Mrs. Jennings, is one Josephine Covett whom petitioner intends on presenting in court to testify upon the hearing of this motion.

In conclusion petitioner alleges that the conviction herein opposed was predicated on erroneous admission of evidence; i.e., "oral hearsay statements" absent proof of the "corpus delecti."

Notwithstanding this prejudicial error committed during the presence of the jury, this petitioner's trial counsel interposed no objections to it.

This constituted prejudicial and substantial error which completely destroyed petitioner's right to impartiality of a fair trial, in that, it prejudice the minds of the jury without evidence. It further precluded reasonable minds from determining whether or not a crime had actually been committed otherwise.

The prosecution's case demonstrates and consists of the following; evidencing the fact that no "corpus delecti" existed.

"The complainant, Mrs. Jennings, testified her son, Thomas, called her on her job, and told her that someone broke into the house and stole the radio-combination-phonograph. Thomas Jennings stated on the witness stand, practically to the same thing. Captain Peters, stated he saw two men get into a cab at the intersection of 3rd & M Sts., N. E., he then approached the cab and spoke to one of the men and questioned him as to what he had in his lap. He also saw (said he) what appeared to be a wooden case on the lap of defendant's Moore, somewhat of mohogany color. He further testified, that he could not identify the defendant (petitioner) Marshall and he couldn't say that what he saw on defendants Moore's lap was a radio-combination. The next witness was Detective Kenneth Cones, who stated that the two defendants admitted in his presence and in the presence of each other and Mrs. Jennings, that the other defendant had entered the house. He also stated that each had separately "denied his own guilt."

11 There are various reasons for alleging that the court committed prejudicial error amounting to the exclusion of proper jurisdiction.

First it is obvious that there was no radio-combination stolen judging the testimony in its entirety; nor was there a radio-combination presented at the trial for possible identification and evidence.

Second, there was no positive identification of the property as such, by the only witness who could identify it at the alleged scene of the crime, i.e., Captain Peters stated that he could not say it was a radio combination he saw.

Third, This Petitioner was never linked in anyway with the crime charged in the indictment except for the fact that Cones in his testimony said that defendant's accused each other, but both denied their own guilt.

Considering the foregoing in its entirety, the proposition is offered here that the government's case fell far short of establishing the fact a crime had been committed through proof of the "corpus delecti."

Ordinarily, however, this phase of legal presentations would embrace what is described as sufficiency of evidence or the lack of it, which is taken on direct appeal. But it is not the sufficiency of evidence or the lack of it

that is in dispute here, but rather, the prejudicial and the substantial affect of admitting erroneously the "oral hearsay accusations of admissions" absent proof of corpus delecti. In short, "the corpus delecti in this particular case involves the possession as well as the existence of the property in question." Therefore, assuming arguendo, that the existence and the possession of the property should be proven before the introduction of the so-called "admissions." There is no legal authorities available to support a contrary view.

Admissions or confessions of a defendant may not be introduced in evidence absent proof of the corpus delecti, by other or independent means. The adverse affects of this erroneous admissions of so-called "evidence" incriminated defendant to such a degree, that, by no stretch of the imagination could it be said that impartiality of trial by jury was preserved as its original interpretations reflects.

Because of the foregoing error, this defendant's presumption of innocence was destroyed at the inception of trial and his right afforded by the Fifth Amendment against self-incrimination.

Counsel took no steps indicating that he objected nor did he point out that the admission of the errors was utterly incompetent and deprived petitioner of due process of law, thereby evidencing a complete lack of understanding or interest of what constituted prejudicial errors.

The inference is clear that the petitioner was denied a fair and impartial trial.

It is reasonable to assume, from the reading of the record, that Counsel concurred with everything that occurred, adverse to petitioner.

## Law and Argument

Whether petitioner was denied a fair trial and effective assistance of counsel guaranteed by the Fifth Amendment and Sixth Amendment because of the failure of appointed trial counsel to call all essential witnesses deprived defendant of a fair trial.

However, if a key witness for the defense is not produced at the trial,

accused is denied the effective assistance of counsel and a fair trial. Wright vs. Johnson, 77 F. Supp. 687, 691 (D.C. N.D. - Calif. 1948). In that case the defense was an alibi to be established by two witnesses whose town of residence was 73 miles from the place of trial. Appointed counsel, although "conscientious" did not produce the witnesses for trial. 77 F. Supp. at 689. Failure to produce these two essential witnesses served as the basis for the Court's finding that defendant was denied effective counsel and a fair trial. Id. at 690-92.

13 Experienced judges and lawyers know that the testimony of a single witness can be decisive. All the known facts in this motion indicates that Sullivan, as well as the Uline Ice Co. employee, (Henry Goram) accompanied and retained by the Detective, was such a witness.

Petitioner herein, has alleged among other things that the principle witness was-coerced and forced to give testimony against her will.

That trial counsel in concert with the Government Attorney concealed, suppressed, and failed to call essential witnesses to petitioner's defense which this Court can assume was a denial of "due process of law."

That petitioner, James A. Marshall, has a witness who can testify to the authenticity of the alleged intimadations of the complainant, Mrs. Jennings, as well as Mrs. Jennings herself.

In accord with the principles of the United States Supreme Court, which laid down for all Courts to follow, in United States vs. Hayman, 342 U.S. 205, (1952); Walker vs. Johnson, 312 U.S. 275, 61 Ct. 85, Bl. Ed. 830; Johnson vs. Zerbst, 304 U. S. 458. Where it stated "that a hearing be had in open Court, and petitioner free to testify." They also ruled that when allegations are made "de hors" the record, a hearing must be afforded to the defendant.

Accordingly, petitioner requests the Court, in conformity with law to secure his presence to give testimony in support of his motion.

Wherefore, all premises considered, petitioner prays this Honorable Court to carefully consider all the allegations set forth herein, and grant the relief sought and is justified under the Constitution of the United States.

14 It is so asked; that Mrs. Louise Jennings, Essie Jennings, Detective Sullivan, and Henry Goram be presented in open court pursuant to the hearing of this motion as is mandatory by the law.

Conclusion

Petitioner requests the Court to treat his motion as writ of error coram nobis as a alternative pursuant to the provisions contained in title 28, Section 2255 U.S.C.A.

The Supreme Court also concluded that the enactment of Section 2255 of title 28 U.S.C.A., providing that a prisoner "in custody" may at any time move the Court which imposed the sentence to vacate itself "in violation of the Constitution or laws of the United States, . . . . or is otherwise subject to collateral attack . . . ." did not preempt this particular field and is bar to the granting of a motion in the nature of a writ of error coram nobis. However, it is immaterial to the defendant upon what legal basis the Court predicate its power to enter an order to grant a hearing on his motion to vacate sentence pursuant to Title 28, Section 2255, so as to enable this defendant to prosecute his motion and present evidence, and produce witnesses defendant has available to substantiate his allegations. Accordingly, it is also requested that the present motion be considered as a coram nobis if the Court prefers to base its action upon this request. However, Section 2255 affords this defendant the right to a "hearing" as well as the coram nobis. Either remedy would meet this test. The choice here, belongs to the court.

15 In view of the foregoing, the defendant is clearly entitled to have the order of the District Court vacated and a hearing be had in open court and defendant and his witnesses be heard orally on the allegations contained herein.

It is so asked.

Respectfully submitted,

James A. Marshall, Petitioner

State of Virginia )
County of Fairfax) ss:

Subscribed and sworn to before me this 11th day of Feb., 1958.

19 /Filed March 4, 1958/

March 3, 1958.

The court finds and certifies that the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief. It further appears from the records that this is a successive motion which the court is not required to entertain. For the reasons stated the attached motion is denied.

/s/ F. Dickinson Letts
Judge

---

26 /Filed August 15, 1958/

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D. C.

Tuesday, September 27, 1955

The above-entitled case came on for hearing before the HONORABLE F. DICKINSON LETTS, United States District Judge and a jury at 11:40 o'clock a.m.

APPEARANCES:

On behalf of the United States:

JOEL BLACKWELL, Esq., Assistant
United States Attorney

On behalf of defendant Moore:

RAYMOND C. KATES, Esq.

On behalf of defendant Marshall:

ALBERT RAPOPORT, Esq.

* * * * * * * * * * * * * * *

27 LOUISE JENNINGS

* * * * * * * * * * * * * * *

DIRECT EXAMINATION

BY MR. BLACKWELL:

* * * * * * * * * * * * * * *

28 Q. When you arrived home did you observe anything unusual in your

apartment? A. My television set, combination set, was missing. My radio combination set was missing.

Q. When you arrived home? A. Yes.

Q. Did you give anyone permission to take it? A. No, sir.

Q. Do you know the defendants in this case, Warren Moore and James A. Marshall? A. Well, I know Mr. Moore when I seen him, you know, in person, but I never know his name.

Q. How did you come to see him, Mrs. Jennings? A. Because when I first moved there he was living in the second floor apartment.

Q. Did he ever visit your apartment? A. No, sir.

* * * * * * * * * * * * * * * *

29 Q. Do you know what happened to your radio combination set? A. No, I didn't. All I know it was gone, and I haven't seen it since.

* * * * * * * * * * * * * * * *

CROSS EXAMINATION

BY MR. KATES:

Q. Mrs. Jennings, what brand was this radio combination that you owned. A. It was an Admiral.

Q. Was it a big one or a little one, or what size? A. Table model.

* * * * * * * * * * * * * * * *

30 Q. You live in a basement apartment? A. Yes, sir.

* * * * * * * * * * * * * * * *

32 CROSS EXAMINATION

BY MR. RAPOPORT:

* * * * * * * * * * * * * * * *

33 Q. I wonder if you could tell me approximately how much it weighed? A. Well, I don't know how much it weighed.

Q. Could you give me a rough estimate, say 30, 50 pounds? A. I don't know. It wasn't very heavy because I could carry it.

* * * * * * * * * * * * * * * *

Q. Can you describe the color, Mrs. Jennings? A. It was brown mahogany

color.

Q. Mahogany? A. Yes.

* * * * * * * * * * * * * * * *

35 Q. Did you see any windows that were open when you came home? A. Well, they was closed then when I got home, but they were open.

* * * * * * * * * * * * * * * *

37 THOMAS JENNINGS, JR.

* * * * * * * * * * * * * * * *

DIRECT EXAMINATION

* * * * * * * * * * * * * * * *

Q. And your mother is Mrs. Louise Jennings? A. Yes, sir.

Q. Directing your attention to June 15th of this year, were you living at that address, 1136 Fifth Street, Northeast? A. Yes, sir.

* * * * * * * * * * * * * * * *

38 Q. What time did you return to your apartment that day? A. I returned 1:30.

THE COURT: What time?

THE WITNESS: 1:30 that afternoon.

* * * * * * * * * * * * * * * *

Q. When you entered the apartment, that is, your mother's apartment, did you observe anything of an unusual nature? A. When I went in the apartment, well, the window was up and the back door was open and the combination was gone.

* * * * * * * * * * * * * * * *

41 CROSS EXAMINATION

BY MR. RAPOPORT:

Q. Now, Mr. Jennings, when you came home that afternoon, could you tell us what window you found that was open? A. The bathroom window.

* * * * * * * * * * * * * * * *

Q. I see. What door was open? A. The back door.

* * * * * * * * * * * * * * * *

43 Thereupon

LOUIS B. PETERS

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKWELL:

Q. State your full name and assignment, Captain, please. A. Louis B. Peters, Captain, Ninth Precinct.

Q. Were you a Captain of Number 9 Precinct on June 15 of this year, sir? A. I was.

Q. Directing your attention to June the 15th of this year, sometime in the early afternoon did you have occasion to be in the vicinity of 3rd and M Streets, Northeast? A. I did.

Q. While in that vicinity did you have an occasion to see one or both of the defendants? A. I saw one of the defendants, and I am not positive of the identification of the other.

Q. Which defendant did you see, Captain? A. Defendant Moore.

Q. Will you point Moore out to His Honor and the jury, please? A. It's the one on the left in the light shirt.

Q. The one with the light shirt on? A. Yes, sir.

44 MR. BLACKWELL: If Your Honor please, may the record show Captain Peters is identifying the defendant Moore as the one with the light shirt.

THE COURT: The record will so indicate.

BY MR. BLACKWELL:

Q. At the time you saw the defendant Moore, was there anyone with him at that time? A. There was another man with him, yes.

Q. And what was defendant Moore doing when you saw him, Captain? A. When I first saw him I saw two men together walking in the 300 block of M Street, Northeast, west approaching the intersection of Third. The defendant Moore was carrying a case under his arm, a brown mahogany-type case under one arm, which appeared to be a phonograph or combination radio-

phonograph.

Q. When you saw Moore, what did you do, if anything, Captain? A. I was in my private car and came to a stop on Third Street south of M to observe them and to see where they were going, and to keep them under observation for the moment.

Q. After observing them, what did they do, if anything? A. When they reached the intersection of Third at M they hailed a taxicab which was headed in the same direction as I was and got into this cab on Third Street headed south at M.

45 Q. What did you do then, Captain, if anything? A. As soon as the cab reached the point just before it reached the point where my car was parked I stopped the cab and told the driver that I wanted to talk with his passengers. When I approached the left side of the cab at the rear door, the defendant Moore was seated on that side with the case across his knees, in his lap. He was questioned as to his identity and he readily produced credentials, social security card and other cards that identified him as Warren Elwood Moore, and answered all questions promptly.

I told him that I thought it was unusual that someone would be carrying a case like that, and asked him where he got it, and he promptly told me that he lived at 1156 Fifth Street, and that that was his property, and that he moved away and that he had come back to get it.

He told me that his address, his home address was 309 Ninth Street, Southeast, and he was going there to his home. He also told me that he was employed as a porter at the United Mine Workers Building Office. His answers were so straighforward and so spontaneous until I didn't detain him any longer but made notes of what he had told me and permitted them to go on their way.

46 I talked particularly to the defendant Moore and had no conversation with the other man with him because I was not too suspicious at the time because of the prompt answers, and I permitted the cab to proceed and did not detain them on the street.

Q. Now, Captain, later on during the day did there come a time that

you received a report relative to a housebreaking at 1136 Fifth Street, Northeast? A. Yes, there did. But prior to that time when I had completed the mission that I was on at the time I went to premises at 1136 Fifth Street to find out if there was anyone who lived there by the name of Moore. The house is a three-family type of building with separate premises in the basement. On the first floor, I knocked at the door and a lady answered who said she lived there, and I inquired if anyone by the name of Moore lived there, and if such a person had been there. She said no, and I asked if there was anyone who lived in the basement apartment, and she said there was, but there was no one home. I tried the door in the basement, and knocked on the door and I got no response.

I had to go on my way for other business. Later in the afternoon approximately 3:00 o'clock I was on duty at Stewart Junior High School at Fifth and E Streets Northeast when the uniformed officers in a scoutcar sought me out to find out if I had been at 1136 Fifth Street earlier in the day because they
47 had just come from there and they received a report of a housebreaking there and they had been told by the resident on the first floor that a police official had been there, and they were making inquiry as to whether it was I.

* * * * * * * * * * * * * * *

50 CROSS EXAMINATION

BY MR. RAPOPORT:

Q. Captain, you said that you didn't examine the case for the simple reason that you were not suspicious and they had given very good answers; yet you say that one half hour after speaking to these two men or whoever was in the cab that you went to the premises where one of the defendants had told you that he had moved the alleged case, is that correct? A. That's right.

MR. RAPOPORT: No further questions.

(Witness excused.)

51 MR. KATES: If Your Honor please, by your leave I would like to recall Officer Cones for a few brief questions.

THE COURT: Yes. Officer Cones, come back.

MR. BLACKWELL: I take it, Your Honor, that he is being recalled for cross examination.

MR. KATES: I don't think my questions will exceed the scope of the prosecutor's direct examination, Your Honor.

MR. BLACKWELL: That's all right.

THE COURT: You may proceed.

Thereupon

KENNETH L. CONES

was recalled as a witness, and having been previously sworn, testified further as follows:

CROSS EXAMINATION (Resumed)

BY MR. KATES:

Q. During the interrogation of the two defendants did you at any time ask them either collectively or individually if they had committed the act for which they were accused? A. I questioned them generally if they entered that premises and took that property; yes, I did.

Q. Then your answer is that you asked them if they committed the crime for which they are charged? A. Generally, I did; yes, sir.

52 Q. What was their response? A. Each denied that he entered the premises, but each admitted that he stood on the outside while the other one went into the rear.

Q. Officer Cones, I never interrupt the witness, and I admire your zeal, but my question is: Did at any time either of the defendants admit performing the crime for which they are charged, to wit, housebreaking and larceny?

MR. BLACKWELL: If Your Honor please, I submit that the officer has answered that question.

MR. KATES: I submit that he has not, Your Honor.

THE COURT: The best answer is what was said.

MR. KATES: I beg Your Honor's pardon?

THE COURT: The best answer is what was said. It is for the jury to say.

MR. KATES: It is not clear in my mind from the officer's testimony

whether these men made a confession or whether they denied their guilt.

THE COURT: You can ask everything that was said between the officer and the defendants, and the jury will know just what occured.

MR. BLACKWELL: If Your Honor please, I submit that the question has been asked several times, and the officer has related what he said to the defendants and what the defendants said to him.

53 MR. KATES: If Your Honor please, we have had a long dissertation on people going up alleys and going in houses and waiting outside, and I have sat here for 15 minutes and I still don't know whether these men confessed to that crime in that officer's presence, and whether they denied it.

THE COURT: That's a question for this jury, not for the witness.

MR. KATES: Your Honor, the witness was in the presence of the two defendants. It was his job to interrogate them, and if possible secure a confession.

THE COURT: And the answer to your questions is in what was said; whether that was a confession or not is for the jury to say.

BY MR. KATES:

Q. Officer, at any time during your interrogation did the defendant Moore state to you that he had stolen a radio? A. Moore simply stated that he was with Marshall when Marshall took the radio, and that Marshall give him $5, after he sold the radio.

Q. Then the answer to my question, I must imply that he did not specifically tell you that he had or had not stolen the radio? A. He only told me that he received some of the proceeds of this radio, and that he waited in the

54 alley until the man had gone in and gotten that radio and brought it out.

Q. I will repeat the same question regarding the defendant Marshall. Did Marshall at any time during your entire investigation or interrogation state to you that he had stolen a radio or denied that he had stolen the radio?
A. Marshall made the same statement. He stated that he waited outside while Moore went in and got the radio, and that he received proceeds from the sale of this radio.

Q. Then I must infer from your answer --

THE COURT: You mustn't.

BY MR. KATES:

Q. At no time --

THE COURT: Counsel must no infer.

MR. KATES: If Your Honor please, I feel that I am being thwarted in my efforts to get a specific answer to a specific question.

THE COURT: Suppose you ask your question again, and you want an answer from the witness whether they used the language that you put in the question, is that it?

MR. KATES: All I would like to know, Your Honor, is, if at any time during any stage of the proceedings Mr. Moore said to this officer, Yes, I stole the radio, or No, I'm as innocent as a new born babe. All I get for a response --

55 THE COURT: Did he say either one of those things?

THE WITNESS: Moore denied stealing the radio. Marshall denied stealing the radio.

MR. KATES: Thank you.

REDIRECT EXAMINATION

BY MR. BLACKWELL:

Q. Did he ever make a statement that, I am as innocent as a new born babe? A. Absolutely not.

MR. BLACKWELL: That's all. You may step down.

MR. RAPOPORT: Excuse me. I have a question.

CROSS EXAMINATION

BY MR. RAPOPORT:

Q. Officer Cones, you say that all this was being taken down in writing and yet these was not offered to either one of these defendants to sign, is that correct? A. I didn't say all of this was taken down in writing, sir.

Q. What was taken down? A. I just took the statement as to their movements from the time they left the vicinity where they met at First and

L Streets until the time when they returned to the vicinity of First and L Street, made the sale and received the money.

56 Q. Included in that statement that you took down was there also the statement that defendant Marshall had said that defendant Moore took it and vice versa? A. That's right, sir.

Q. And yet you say that this statement was not offered to either one of the defendants to be signed? A. It was not, sir.

Q. Isn't that the usual practice to offer a statement to be signed? A. My practice is to confront the defendant or defendants with the complainant, and let the complainant hear their admissions or their statements.

Q. Then you say that Mrs. Jennings heard the admissions? A. She was present.

Q. And she heard the defendants say that the other defendant had taken it? A. If her hearing is good, I would say she heard it.

Q. Wouldn't you say that it is a standard practice to get a signed statement of admission of guilt from the defendant in a criminal case in order to have that produced in evidence at a criminal case? A. That can be used, but I wouldn't say it is the standard practice.

57 Q. But it is done, is that correct? A. It can be done.

Q. It is done? A. I never do it.

Q. It is done by the Metropolitan Police Department? A. I never do it when I have my complainant.

Q. Do you know other officers who do it? A. My partner doesn't do it.

Q. Have you ever heard of anyone in the District doing it? A. It may be.

Q. Has it been done?

MR. BLACKWELL: I submit this officer has answered that question.

THE COURT: Sustained.

MR. RAPOPORT: No further questions.

MR. BLACKWELL: If Your Honor please, the government rests.

(Witness excused.)

Thereupon

58 KENNETH L. CONES,

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKWELL:

Q. State your full name. A. Kenneth L. Cones.

Q. What is your business? A. Detective, assigned to the Ninth Precinct.

Q. Were you so assigned on June 15th of this year, Detective Cones? A. I was.

Q. Directing your attention to June 15th of this year, did you receive a complaint concerning a housebreaking at 1136 Fifth Street, Northeast? A. I did.

Q. Basement apartment? A. Yes, sir.

Q. As a result of that complaint were you assigned to the case? A. I was.

Q. Did you make an investigation? A. I did.

Q. Did there come a time when you talked to the two defendants here,
59 Warren Moore and James Marshall? A. I did.

Q. Will you tell his Honor and the jury just the circumstances under which you did talk to the defendants relative to this housebreaking? A. I talked to the defendant Moore at the Ninth Precinct after he was arrested, and also at the First Precinct.

Q. When was that? A. This was on June 20th, in the evening. I also talked to Moore at the First Precinct. At the First Precinct I talked to Marshall. They both stated in each other's presence and the complainant's presence that --

THE COURT: In whose presence?

THE WITNESS: And the complainant, Mrs. Jennings, and the defendant No. 1, Moore, stated that some time around noon of June 15, 1955, he met Marshall, a friend of his, somewhere around First and L Streets, Northwest. They decided to go over to Northeast Washington to look for work. They

walked, and while in an alley to the rear of 1336 Fifth Street, Northeast, where I learned Moore formerly lived, Moore states or stated to me that Marshall entered the garage, the garage to the rear of these premises. He returned 10, 15 minutes later carrying a dark brown plastic case containing a radio-victrola combination.

The two then walked to Third and M Streets, Northeast, where they caught a cab, and they had ridden this cab to the vicinity of First and L Streets,
60 Northwest, and Moore states that at that time Marshall left him, taking this combination set with him, and went into an alley, he did not know where he had gone, returned 10, 15 minutes later, and gave Moore, Moore stated Marshall gave him $5.

On the other hand Marshall stated it was just the other way, that he waited in the alley to the rear of premises 1136 Fifth Street, Northeast, while Moore entered through the garage to the rear of these premises, and that Moore returned some 10 or 15 minutes later carrying this combination set, and that they walked to Third and M Streets, Northeast, where they caught a cab, and the two men went to the vicinity of First and L Streets, Northeast.

At that point Marshall stated Moore took the set and went into an alley somewhere.

MR. KATES: If Your Honor please, may I interject and interrupt the witness and ask one short question with your leave, Your Honor?

THE COURT: Yes.

MR. KATES: Were Moore and Marshall together at this interrogation?

THE WITNESS: They were both together at this interrogation.

MR. KATES: In the same room when you were asking these questions?

61 THE WITNESS: They were almost as close as they are now. Marshall stated that Moore took the phonograph when they got out of the cab in the vicinity of First and L Streets, Northeast, and went into an alley with the set. He didn't know where he had gone. He returned some 10 or 15 minutes later and Marshall said that Moore gave him six or seven dollars. He didn't know how much. I asked him a second time, "Don't you remember how much money

he gave you?" He said, "No, it was $6 or $7."

The two were supposed to have parted after this transaction.

I questioned further as to where this phonograph set was sold and both of them denied they had any knowledge as to where it was sold.

MR. BLACKWELL: Thank you, Officer. You may inquire.

CROSS EXAMINATION

BY MR. KATES:

Q. Officer Cones, do you have your notes of this investigation in front of you? A. No, sir, I don't have any notes with me of this investigation.

Q. Do you have notes of your investigation efforts? A. It is possible they are at the precinct in the file.

* * * * * * * * * * * * * * *

64 CROSS EXAMINATION

BY MR. RAPOPORT:

Q. Detective Cones, you stated that Mr. Moore and Mr. Marshall, the defendants in this case, were in the same room together and each had admitted that the other had committed this crime? A. They were in the same room and confronted, and each accused the other one of going in the rear of premises 1136 Fifth Street, Northeast, while the other stood in the alley and waited.

Q. While they were being questioned were their statements being taken down? A. When I started my statement of facts I did take the statement

65 from the two defendants?

Q. Were the defendants asked to sign those statements? A. No, sir, they were not.

MR. RAPOPORT: That is all.

MR. BLACKWELL: I have no further questions, Your Honor.

(Witness excused.)

66 MR. RAPOPORT: I would like to request to have Mrs. Jennings placed on the stand again, sir.

THE COURT: Mrs. Jennings, come back a minute, please.

Thereupon

LOUISE JENNINGS

was recalled as a witness, and having been previously sworn, testified further as follows:

CROSS EXAMINATION (Resumed)

BY MR. RAPOPORT:

Q. Mrs. Jennings, were you present when Detective Cones was questioning the two defendants in this case? A. Yes, I was.

Q. Did either one of the defendants admit that the other one committed the crime? A. Yes, sir.

MR. RAPOPORT: Thank you.

* * * * * * * * * * * * * * * *

Friday, October 21, 1955.

68 The above-entitled case came on for hearing on motion at 10:00 o'clock a.m. on Friday, October 21, 1955, in the United States District Court for the District of Columbia, in the Court House, at Washington, D. C.

B E F O R E:

HONORABLE F. DICKINSON LETTS, Judge of the United States District Court for the District of Columbia.

A P P E A R A N C E S:

JOEL BLACKWELL, Esquire, Assistant United States Attorney, on behalf of the United States; and

RAYMOND KATES, Esquire, on behalf of the defendant Moore, and

ALBERT RAPOPORT, Esquire, on behalf of the defendant Marshall.

* * * * * * * * * * * * * * * *

69 THE COURT: I want to see your motion, Mr. Rapoport.

Mr. Rapoport, tell me about the motion here. There is a motion in the case?

MR. RAPOPORT: Well, the motions, Your Honor, are for a new trial, and it is based upon insufficient evidence to go to the jury.

I would like to present a memorandum in support of the argument I am

about to make here which is for Your Honor's use.

THE COURT: You may proceed.

* * * * * * * * * * * * * * * *

71 Now, the defendants represent, Your Honor, that there was insufficient evidence to go to the jury in this case, and that therefore a verdict of acquittal should have been directed for the defendants.

The basis of our argument is that the testimony of Detective Cones should not have been admitted in evidence and without such testimony that there was insufficient evidence to convict the defendants. Also, without such testimony, the defendant Marshall is not shown to have participated in the offenses charged and is not linked at all by any of the preceding evidence.

72 In addition, the Court in his Charge to the Jury said that the statements made by the defendants to Detective Cones, if freely made, were admissible.

Now, the only basis for admitted the testimony of Detective Cones as to the extra-judicial statements of the defendants was that they would sit within the exception to the hearsay rule, namely, that the supposed statements of each defendant was tacit admissions of guilt by the other defendants.

* * * * * * * * * * * * * * * *

80 Your Honor, on the basis of the authority I have just read, and on the basis of the evidence which has been admitted into the trial against the defendants of Detective Cones, I would like to ask you to consider a motion for a new trial or for a judgment of acquittal notwithstanding the verdict in this case.

* * * * * * * * * * * * * * * *

81 MR. BLACKWELL: Well, I might answer that by saying that I don't have a copy of these authorities which counsel read. I have a copy of a motion without authorities, and I wasn't served a copy of the authorities.

Now, as to Detective Cones, Your Honor, Detective Cones testified briefly that he questioned these two defendants, and these two defendants admitted being in the vicinity and admitted participating in the housebreaking, and that one stayed on the outside while the other went into the house. Now, one

defendant accused the other defendant of going inside, and the other defendant accused the other defendant of going in.

THE COURT: Is that what the defendant testified about?

MR. RAPOPORT: He stated that each accused the other of the crime. And stated that the other had gone into the house.

THE COURT: Well, one is a lookout?

MR. RAPOPORT: I don't recall that they admitted that there had been a lookout, Your Honor.

MR. BLACKWELL: Well, they both were there this morning and aided and abetted in this case. One was a lookout and the other went in. It was a question as to which one was lookout and which went in.

THE COURT: I think this whole thing turns upon the examination in
82 Detective Cones' testimony.

MR. BLACKWELL: Very well, Your Honor.

THE COURT: Mr. Blackwell, will you have it written up for me?

MR. BLACKWELL: I shall be glad to, Your Honor. Shall I make a request of the reporter?

THE COURT: Yes.

* * * * * * * * * * * * * * *

THE COURT: Mr. Blackwell, if Detective Cones testified as is stated here in this memorandum and said nothing else, then, of course, they are entitled to their motion for a new trial.

MR. BLACKWELL: But it goes further than this, Your Honor.

THE COURT: Well, I have got to know just what he said, since this is alleged to have been his testimony.

MR. BLACKWELL: I don't concede that it is his testimony.

* * * * * * * * * * * * * * *

83 THE COURT: And the motions will be continued until that transcript can be had. When it is ready, I will advise counsel, and you can have the defendant back.

* * * * * * * * * * * * * * *

84 Friday, November 4, 1955.

The above-entitled case came on for hearing on motion at 10:00 o'clock a.m., on Friday, November 4, 1955, in the United States District Court for the District of Columbia, in the Court House, at Washington, D. C.

B E F O R E:

HONORABLE F. DICKINSON LETTS, Judge of the United States District Court for the District of Columbia.

A P P E A R A N C E S:

JOEL BLACKWELL, Esquire, Assistant United States Attorney, on behalf of the United States; and

RAYMOND KATES, Esquire, on behalf of the defendant Moore, and

ALBERT RAPOPORT, Esquire, on behalf of the defendant Marshall.

* * * * * * * * * * * * * * * *

85 THE COURT: Gentlemen, I think we remember that on October 21st a motion was argued in behalf of the defendants, Warren E. Moore and James A. Marshall. At that time some uncertainty existed in the mind of counsel and the Court as to the testimony of the officer who appeared as a witness at the trial of the case, and as to the effect of that testimony.

At that time I requested Mr. Blackwell that he contact the reporter and have the testimony of that officer written up. That was done, and several days ago it was placed in my hands.

I have had occasion to read it, and I am quite sure that taken as a whole the testimony does not bear out the interpretation Mr. Rapoport put upon it. The testimony shows quite clearly and is consistent with the theory that these defendants were engaged in a joint enterprise. So the motion for a new trial, which was then heard, will now be denied.

Let the defendants stand for sentence.

* * * * * * * * * * * * * * * *

THE COURT: Each of you men are to be sentenced in Criminal Case 633-55, on the first count which charges housebreaking, and the second count which charges petit larceny.

86 Mr. Kates, what do you have to say for the defendant?

MR. KATES: I have nothing to add to the report.

THE COURT: You represented Moore, did you not?

MR. KATES: I represented Mr. Moore, Your Honor.

THE COURT: You also represented Mr. Moore, did you not?

MR. RAPOPORT: Yes, sir.

THE COURT: Do you have anything to say to the Court?

MR. RAPOPORT: I would like you to consider before sentence, Your Honor, that both men have been incarcerated since June 20th, a period of four months, and the fact that there was no violence involved, no assault or battery upon another person in this act committed by the defendant, and therefore I ask that you consider that favorably in pronouncing sentence.

THE COURT: Yes.

Moore, do you have anything to say why sentence should not be pronounced upon you?

THE DEFENDANT MOORE: No, sir, only I would like you to be as lenient as possible. I am married and have a kid just born in July.

MR. RAPOPORT: I would like to say Mr. Moore has four children.

87 THE COURT: Yes.

MR. RAPOPORT: And it would impose a burden upon the community as to who would take care of the four children and his wife.

THE COURT: Mr. Rapoport, you represent the defendant Marshall?

MR. RAPOPORT: Yes, sir.

THE COURT: What do you have to say for him?

MR. RAPOPORT: Well, I would like you to consider the fact that he also has been incarcerated for four months, and that he is of tender age, 26, a time when a young man should be married, raising a family and having a steady job. I do think that the boy is capable of being reformed and returned to society, and that a long prison sentence would not appear to help him in that way.

* * * * * * * * * * * * * * *

IN THE UNITED STATES DISTRICT COURT
90/ Filed Feb.1,'56/ FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| No. 2 | : | |
| James A. Marshall | : | |
| Petitioner | : | |
| Box 25, Lorton, Va. | : | |
| | : | |
| vs. | : | Criminal Case No. 633-55 |
| | : | |
| United States of America | : | |
| Respondent | : | |

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE: JURISDICTION: 28 USC, SECTION 2255

Comes now the petitioner, James A. Marshall, in the above entitled cause, and moves this Honorable Court for a Motion to vacate, set aside or correct the sentence under Title 28, USC, Section 2255, for the reason herein after set forth.

That the sentence of two (2) to eight (8) years imposed by the Honorable Judge Dickenson F. Letts in the District Court for the District of Columbia on November 4th, 1955, was a violation of the Constitution, and the laws of the United States and the court was without jurisdiction to impose such sentence for the following reasons:

I, James A. Marshall will proceed to prove that certain rights and liberties were violated under the Constitution of the United States.

That petitioner was illegally arrested and charged with Vio: (22 D.C.C. 1801, 2201, 2202)

(GRAND JURY CHARGES)

(First Count) On or about June 15, 1955, within the District of Columbia, James A. Marshall, entered the apartment of Louise Jennings with intent to
91 steal property of another.

(Second Count) On or about June 15th, 1955, within the District of Columbia, James A. Marshall stole the property of Louise Jennings, consisting of one (1) radio-phonograph combination of the value of $75.00.

OPINIONS OF THE PETITIONER

It is the opinion of the petitioner, James A. Marshall, that the court allows him to proceed in said action because of the following reasons:

(1) It is the opinion of the petitioner that he be allowed to proceed in said action because of his present financial status.

(2) It is the opinion of the petitioner that he be allowed to proceed in said action because he was wrongfully convicted of counts in said action.

(3) It is the opinion of the petitioner that he be allowed to proceed in said action because certain rights of the petitioner were not fully explained to him during the trial.

(4) It is the opinion of this petitioner that the court erred in failing to grant petitioner motion for new trial or acquital.

(5) It is the opinion of this petitioner that the court erred in admission of the hearsay oral statements presented.

(6) It is the opinion of this petitioner that the nature of the trial was prejudiced as a whole.

(7) The Incompetence of this Petitioner's Counsel.

It is Hornbook's law that the burden is on the prosecutor to establish guilt of each element of the offense, difficulty of proof is no substitute for actuality of proof.

Testimony shows that no admissions were made by this defendant. The question is whether such hearsay evidence is admissable when there's no admission to the said crime from either defendant. The testimony of the two witnesses, Mrs. Jennings and Detective Cones, is not only hearsay evidence but, also adducted from a so-called oral statement from co-defendant.

92 The hearsay rule which dictates that only if the accomplice reiterates his accusatory statement in court, and thus is subject to cross-examination, can it be admitted against his co-defendant. The said rule is also supported by the theory that the mere testimony of accomplices should not be of sufficient weight to convict an accused since the temptation for self absolution by means of perjury is too great to permit such a statement to be regarded seriously.

The trial Judge denied my Motion for new trial: his reasons were, that he <u>believed</u> (not by the evidence presented) that the defendant was involved in an adventure. This petitioner contends that the trial Judge was prejudiced and

biased in violation of my rights to a fair and impartial trial.

It might be said that where the effect on the jury verdict of incompetent evidence is unknown and merely speculative, its admissions must be held to be reversible error.

Legman vs. U. S. 295 F. 474 (C.C.A. - 3rd, 1924)

The denial of by appellant of an accusatory statements would have rendered it inadmissable.

Skiskowski vs. U.S. 81 U.S. App. D. C. 274, 158 F. 2d 177, (D.C. Cir., 1946)

In the instant case, such hearsay not even rising to the level of an accusatory statements lends itself to making can irrefutable case for the prosecu- (sic) tion. Moore did not take the stand, and his credibility was not in issue. He was not called as a witness by the prosecution, and, as in all hearsay not afforded the opportunity of cross-examination. Despite lack of objection at trial, it is left to this Honorable Court's discretion as to the weight of prejudice this was bound to have engendered in the minds of the jury.

U. S. vs. Sansone, 206 F. 2d 86 (C.C.A. - 2d, 1953)

It is the reading of the entire record with it's many inferences and unasked or unanswered questions which inevitably gives substance to appellant's claim of plain error warranting reversal of the judgment herein.

93 Kotteakos vs. U. S. (Supea.) (sic)

Under these specific items mentioned herein above, and the charge in its entirety despite avowed satisfaction by appellant's trial counsel, substantial rights of appellant were affected so as to deprive him of a fair trial by jury under proper and adequate instruction.

Payton vs. United States, Supea. (sic)

Bollenbach vs. United States, Supea. (sic)

You will note that intent is an essential element of the offense. Intent is an operation of the mind and there is no way whereby you may see the human mind operate.

The only way that you are able to judge of intent is by the circumstances you infer what intent there was, if any. (Since there was no positive identifi-

cation of this defendant on the alleged scene of the crime; hence, housebreaking was not proven, because the essential element of intent wasn't proven. To prove intent, one has to be identified on the scene of the alleged crime and the circumstances surrounding it.)

In view of the fact petitioner's allegations with respect to the conduct of trial counsel must be taken as true for the purpose of this instant Motion, the only remaining issue which this court is now called upon to consider is this: Where counsel had led a convicted defendant to believe erroneously that a timely appeal was to be taken from the conviction does the denial of defendant's subsequent claim that he is entitled to relief from his unjust conviction under 28 USC, Section 2255 (Supp. 1952) present a substantial question of law which warrant's review? The answer, it is submitted, is yes.

This petitioner have this day hold that he was denied Due Process of Law secured to him by the fifth, sixth and fourteenth Amendment of the Constitution.

94 Petitioner says, that he had been scheduled to go on trial several times and that there was no relevant facts, as to why the petitioner's case was continued, and that he, the petitioner, had been made the product of excusable neglect. Nor was this petitioner advised by his counsel why or what took place in relation to these continuances. During these continuations, my presence in the court was not requested by the court or counsel, which was a direct violation of my Constitutional Rights, in regards to all action taken in my case, by the Government or Counsel.

Petitioner says that there is beyond a mere speculation as to why the Government avoided bringing petitioner's case to trial (quaris) that it is plainly showing that the petitioner's case was not a case of magnitude as to the pertinent facts set forth by the District Attorney should not have been admissable.

Counsel refused to summarize before jury in my behalf. Counsel refused to cross-examine witness in regard to my identification.

Counsel refused to cross-examine witness on conflicting testimony.

Counsel refused to use information furnished by this defendant.

This Honorable Court has recently stated, in Payton vs. U. S., U. S. App.,

D. C. - 222 F. 2d 794 (D.C., Cir., 1955):

"None of the errors referred to was called to the attention of the trial court by defense counsel. The absence of objection ordinarily relieve an appellate court of the necessity of noticing errors, but it does not preclude the court from doing so.

"The errors we have discussed affected substantial rights and deprived appellant of a fair trial on the housebreaking and larceny charges. Therefore, however unfavorable to appellant, we might view the evidence, which, aside from the confession, was circumstantial, a new trial will be granted." Also see; United States vs. Cumberland, 200 F. 2d 609, 611 (C.C.A. - 3rd, 1952):

95 "It has long been recognized that an unskilled layman must normally rely upon those trained in the law for mastery of the techniques involved in perfecting an appeal from a Criminal conviction. Thus, the Supreme Court of the U. S., has recognized the insuperable obstacle that an appeal presents to a layman who is unassisted by counsel. Smith vs. O'Grady, 312 U. S. 329, 333 - 334 (1941):

Petitioner contend that his court appointed trial counsel did not adequately prepare his case. Petitioner in effect contend that he was deprived effective right to counsel assured under the 6th and 14th Amendments. See decisions below:

Assistance of counsel under the sixth Amendment contemplates that it be effective, Glasser vs. United States, 315 U.S. 60, 76, 62 S. Ct. 457, 866. Ed. (1949):

"A defendant in a criminal case may not legally be found guilty, except in a trial in which his Constitutional Rights are scruplulosly observed, no conviction can stand, no matter how overwhelming the evidence of guilt, , if the accused is denied the effective assistance of counsel or any other element of Due Process of Law without which he cannot be deprived of life or liberty. U. S. 215 F. 2d. 330, Mason vs. U. S. (1951) 90 U. S. App. D. C. 1 193 F. 2d 23:

Your Petitioner desires to call attention to the court that he is in dire need of a lawyer every step of the way, which is guaranteed by the Constitution and the statutes. Your petitioner cannot possibly handle this matter properly without

such aid. Your petitioner is assured in his knowledge of his own innocence, and if he cannot disclose the facts of his innocence to this Court, it is because of his lack of ability to do so, and not that the facts are not present.

Wherefore your petitioner prays:

(1) That counsel be appointed to aid and assist your petitioner in preparing all further motions and actions, errors in properly presenting this issue.

96 If the Court please, I feel that actually justice does require that this defendant be given a new trial or acquital so that he will have every opportunity to prove his innocence or the Government prove his guilt in accordance with the facts, not with what went on in the transcript.

Respectfully submitted,

/s/ James A. Marshall, Petitioner

CERTIFICATION OF SERVICE:

I, James A. Marshall, being first duly sworn according to law, deposes and says, on oath, that I have mailed, postage prepaid, a copy of said Motion to the U. S. Attorney, Leo Rover, for the District of Columbia, U. S. Courthouse, Washington, D. C., this 30th day of January, 1956.

/s/ James A. Marshall, Petitioner

SUBSCRIBED AND SWORN TO BEFORE ME this day: the 30th day of January, 1956, at Lorton, Virginia.

/s/ Edward T. Flanagan

90 February 3, 1956. The court finds and certifies that the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, accordingly the motion is denied.

/s/ F. Dickinson Letts
Judge

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,604

150

JAMES A. MARSHALL, APPELLANT,

*v.*

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court
for the District of Columbia


OLIVER GASCH,
*United States Attorney.*

CARL W. BELCHER,
EDGAR T. BELLINGER,
*Assistant United States Attorneys.*



United States Court of Appeals
For the
District of Columbia Circuit

FILED OCT 17 1958

Joseph W. Stewart
CLERK

No. 14,604

## QUESTIONS PRESENTED

Where an appellant has previously filed a 2255 motion alleging violation of his Constitutional rights because of incompetent counsel, and later files a second 2255 motion making the same claims but adding a new allegation that his counsel failed to call an "essential" witness, in the opinion of the appellee the following questions are presented:

(1) Is the second motion a successive motion for similar relief within the meaning of 28 U.S.C. §2255?

(2) Where appellant fails to state why the new allegation was not raised in previous proceedings as required by *Turner* v. *United States, infra,* is the District Court required to hold a hearing?

(3) Are the allegations sufficient to show that the trial was a farce and mockery of justice?

## INDEX


| | Page |
|---|---|
| Counterstatement of the Case | 1 |
| Constitutional Amendment and Statute Involved | 3 |
| Summary of Argument | 5 |
| Arguments: | |
| I. *The Motion to Vacate Was A Second, Successive Motion Which The Trial Court Was Not Required To Entertain* | 5 |
| II. *The Allegations Were Not Sufficient To Warrant A Hearing* | 7 |
| Conclusion | 9 |


### TABLE OF CASES


| | |
|---|---|
| *Adams* v. *United States*, 95 U.S.App.D.C. 354, 222 F.2d 45 (1955) | 7 |
| *Belton* v. *United States*, U.S.App.D.C., No. 13690 (May 15, 1958) | 6, 7 |
| *Brown* v. *Allen*, 344 U.S. 443, (1953) | 7 |
| *Dunn* v. *United States*, 234 F.2d 219 (6th Cir. 1956), *cert. denied*, 352 U.S. 899 (1956) | 6 |
| *Edwards* v. *United States*, U.S.App.D.C. No. 14172 (May 9, 1958) | 8 |
| *Lipscomb* v. *United States*, 226 F.2d 812 (8th Cir. 1955), *cert. denied*, 350 U.S. 971 (1955), *reh. denied* 350 U.S. 1003 | 6 |
| *Mitchell* v. *United States*, U.S.App.D.C. No. 14198 (June 12, 1958) | 9 |
| *Plummer* v. *United States*, U.S.App.D.C. No. 14355 (October 9, 1958) | 8 |
| *Turner* v. *United States*, U.S.App.D.C. No. 14446 (July 10, 1958) | 7 |
| *White* v. *United States*, 98 U.S.App.D.C. 274, 235 F.2d 221 (1956) | 6 |


### OTHER REFERENCES


| | |
|---|---|
| Constitution of the United States of America, Amendment VI | 6 |
| Title 22, District of Columbia Code, Section 1801 | 1 |
| Title 22, District of Columbia Code, Section 2201 | 1 |
| Title 22, District of Columbia Code, Section 2202 | 1 |
| Title 28, United States Code, Section 2255 | 5, 6 |

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 14,604

---

JAMES A. MARSHALL, APPELLANT,

*v.*

UNITED STATES OF AMERICA, APPELLEE.

---

**Appeal from the United States District Court for the District of Columbia**

---

## BRIEF FOR APPELLEE

---

### COUNTERSTATEMENT OF THE CASE

On July 11, 1955, appellant and a co-defendant Moore were charged in a two-count indictment with housebreaking and petty larceny (violation 22 D.C. Code §§1801, 2201 and 2202) (J.A. 1). At trial on September 27, 1955, before a jury, the complaining witness and her son testified that their apartment had been entered and a radio combination set taken (J.A. 13, 14). Captain Peters of the Ninth Precinct testified that he had seen the co-defendant Moore on the day in question with what appeared to be a combination radio-phonograph and that Moore was accompanied by an unidentified person (J.A. 15, 16). Detective Cones testified that he questioned appellant and Moore concerning the crime and that each admitted par-

ticipating and receiving a part of the proceeds but claimed the other had made the actual entry and the subsequent sale of the stolen property (J.A. 22, 23). Both were found guilty as charged (J.A. 2). A motion for new trial was filed and, after arguments on October 21 and November 4, was denied (J.A. 25, 28). On November 4, 1955, appellant was sentenced to a term of two to eight years imprisonment (J.A. 2, 3). On November 12, 1955, appellant filed a letter in the nature of an application for leave to proceed on appeal in forma pauperis, which also was denied (App. Br. 3).

Appellant then filed a petition for leave to appeal in forma pauperis in this Court alleging erroneous admission of hearsay evidence and "Incompetant Councel". As to the latter, the following allegations were made: "(1) Allowed witnesses to be lead in their testimony by Government Attorney. (2) Refuse objection, in contrary to my wishes. (3) Refused to Summerized before jury in my behalf. (4) Refuse to cross-examine witnesses on conflicting testimony. (5) Refuse to cross-examine witnesses in regard to my identification. (6) Refuse to ask questions of witnesses from information furnished by this defendant." This Court denied the petition by order dated January 9, 1956. See Misc. 597.

On February 1, 1956, appellant filed his first motion to vacate sentence pursuant to 28 U.S.C. § 2255 alleging *inter alia* erroneous admission of hearsay evidence and incompetence of counsel (J.A. 30, 31). Among the general allegations were the following as to his counsel: (1) Counsel did not advise appellant "why or what took place in relation to these continuances.[1] (2) "Counsel refused to summarize before the jury in my behalf"; (3) Counsel refused to cross-examine witness in regard to my identification"; (4) "Counsel refused to cross-examine witness on conflicting testimony"; and (5) "Counsel refused to use information furnished by this defendant" (J.A. 33). This motion was denied by the trial court on February 3,

[1] The record is barren as to any continuances before trial.

1956 (J.A. 35). Appellant sought leave to appeal in forma pauperis in this Court, but his petition was denied by order dated April 6, 1956 (Misc. 634).

After two other unsuccessful motions,[2] appellant filed his second motion to vacate sentence pursuant to 28 U.S.C. §2255—which is the basis of the present appeal. In this motion appellant again alleged (1) erroneous admission of hearsay evidence and (2) ineffective assistance of counsel, but for the first time he alleged that his attorney had failed to call two "essential witnesses"—a Detective Sullivan and one Henry Gorman (J.A. 5-7). Under date of March 3, 1958, the trial court found the motion to be a successive motion and that the files and records conclusively showed appellant was entitled to no relief. The motion was accordingly denied (J.A. 12). This appeal followed (Misc. 999).

## CONSTITUTIONAL AMENDMENT AND STATUTE INVOLVED

Amendment VI of the Constitution of the United States of America provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## STATUTE INVOLVED

Title 28 U.S.C. §2255 provides, in pertinent part:

*Federal custody; remedies on motion attacking sentence.*—A prisoner in custody under sentence of a court estab-

---

[2] Appellant sought a copy of the docket entries in Crim.No. 633-55. This application was denied below and by this Court. See Misc. 663. Appellant also filed a motion for reduction of sentence, which also was unsuccessful. See Crim.No. 633-55.

lished by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that

the remedy by motion is inadequate or ineffective to test the legality of his detention.

## SUMMARY OF ARGUMENT

Where an appellant has previously filed a 2255 motion alleging violation of his Constitutional rights because of incompetent counsel, a second 2255 motion alleging violation of Constitutional rights on the same grounds is a second, successive motion for similar relief within the meaning of 28 U.S.C. §2255 which the trial court was not required to entertain.

A new allegation that counsel failed to call an alleged "essential" witness and an allegation raised for the first time on appeal that counsel had a "dual interest" does not constitute a sufficient showing that the trial was a farce and mockery of justice, nor warrant a hearing where no explanation is offered for not having previously asserted these "old claims".

## ARGUMENT

### I

### The Motion To Vacate Was A Second, Successive Motion Which The Trial Court Was Not Required To Entertain

Appellant urges that he was denied effective assistance of counsel in that his attorney "(1) failed to call a witness who would have established his innocence, (2) failed to make any defense, (3) did not object, at the trial, to the admission of prejudicial hearsay testimony" (App. Br. 8), and had a "dual interest" by virtue of his making the legal argument for a new trial for both defendants and also by speaking in behalf of the co-defendant at the sentencing as well as for appellant. (App.Br. 11).

Since appellant filed a motion to vacate pursuant to 28 U.S.C. §2255 on February 1, 1956 (J.A. 30), it is immediately clear that the present 2255 motion is a "successive" motion within the meaning of 28 U.S.C. §2255, which provides in part as follows:

> "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

The only remaining question then is whether this "successive" motion was for "similar relief". In the 1956 motion to vacate, appellant claimed "That the sentence . . . was a violation of the Constitution, and the laws of the United States" (J.A. 30). The grounds for this claim essentially were (1) " . . . the court erred in admission of the hearsay oral statements presented" and (2) "The Incompetency of this Petitioner's Counsel" (J.A. 31). In the present motion to vacate appellant claims that he "has been deprived of a fair trial with conceivetions (sic) effective assistance of counsel within the meaning of the Sixth Amendment of the Federal Constitution." (J.A. 5). Appellant also claims "that the conviction herein opposed was predicated on erroneous admission of evidence;[3] i.e., 'oral hearsay statements' " (J.A. 7). It is thus clear beyond peradventure that both of appellant's 2255 motions sought "similar relief", that is, in each appellant claimed "the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States".[4] See *Belton* v. *United States,* —— U.S.App.D.C.——, No. 13690 (May 15, 1958) (dissent); *Dunn* v. *United States,* 234 F.2d 219 (6th Cir. 1956), *cert. denied,* 352 U.S. 899 (1956); *Lipscomb* v. *United States,* 226 F.2d 812 (8th Cir. 1955), *cert. denied.* 350 U.S. 971 (1955), *reh. denied,* 350 U.S. 1003. (1955).

It is also apparent that not only did appellant's motion to vacate seek the same relief, but it did so on the same grounds, i.e. erroneous admission of evidence and ineffective assistance of counsel. Thus the familiar doctrine of res judicata is applicable. See *Lipscomb* v. *United States, supra.* Further, since the only new factual alle-

---

[3] It is well established that errors of law or fact such as this do not afford a basis for a 2255 motion. White v. United States, 98 U.S.App.D.C. 274, 235 F.2d 221 (1956).

[4] 28 U.S.C. § 2255.

gations are that counsel failed to call an "essential" witness [5] and that counsel had a "dual interest", no reasons being offered why these allegations were not made in an earlier proceeding, the motion falls squarely within the doctrine established by this Court in *Turner* v. *United States,* U.S.App.D.C., No. 14446 (July 10, 1958), wherein it was said:

> "Where there has been a previous appeal or a previous 2255 motion, the District Judge has discretion to deny relief as to those allegations which could have been, but were not, raised in the earlier proceeding, *unless* the petitioner has 'some justifiable reason he was previously unable to assert his rights,' or unless he was 'unaware of the significance of relevant facts.' Absent some allegation or evidence as to what is 'justifiable reason' or 'unawareness', the District Court is under no duty to grant a hearing on what appears on the face of the petition to be old claims; . . . ."

Accordingly, the trial court was not required to "entertain" [6] the motion.

## II

### The Allegations Were Not Sufficient To Warrant A Hearing

Even if the motion were not a second, successive motion for similar relief, appellant would not be entitled to a hearing since his claim of ineffective assistance of counsel is insufficient to warrant a hearing. The rule in this jurisdiction is clear. "It must be shown that the proceedings were a farce and a mockery of justice . . . ." *Adams* v. *United States,* 95 U.S.App.D.C. 354, 222 F.2d 45 (1955).

---

[5] The motion makes clear that this ground, if true, was known at the time of the first motion to vacate and when appellant sought to appeal (Misc. 597).

[6] The word "entertain" has been construed to mean a "conclusion, after examination of the application with such accompanying papers as the court deems necessary, that a hearing on the merits legal or factual is proper. Brown v. Allen, 344 U.S. 443, 461 (1953); Belton v. United States, *supra* (dissent).

"Mere improvident strategy, bad tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel, unless taken as a whole the trial was a 'mockery of justice'." *Edwards* v. *United States,* U.S.App.D.C., No. 14,172 (May 9, 1958).

To sustain his burden of showing "a farce and mockery of justice", appellant alleges first that his counsel failed to call two essential witnesses: a Detective Sullivan and one Henry Goram. The testimony to be elicited from Detective Sullivan is Goram's alleged statements (J.A. 6). Since this would obviously be hearsay, it would not be admissible. Certainly, it cannot be said that counsel was ineffective for failing to call such a witness. The substance of the proposed testimony of Henry Goram is essentially lack of identification, that is, that appellant was not one of "two men walking down the street and get[ting] in[to] a cab directly in front of the building where he (Henry Goram) works, with a square object, alleged by the police to be the stolen property" (J.A. 6). How this could establish appellant's innocence is difficult to perceive when by his own admission to the police, appellant was with Moore (the co-defendant) during the commission of the crime and shared in the proceeds from the sale of the stolen property (J.A. 19). Even assuming that this witness were available and would testify as appellant asserts, the failure to call this witness would at best be a mistake or improvident strategy, and certainly in and of itself does not make the trial a farce and mockery of justice.

Finally, appellant's assertion that his counsel had a "dual interest", because he spoke in behalf of both defendants at the motion for new trial and at sentencing[7] is clearly without merit. Even if this Court were to consider the point,[8] it is clear that since the only point to be

---

[7] Appellant's counsel and Moore's counsel were each present on both occasions (J.A. 25, 28).

[8] Since not mentioned in the motion below, it cannot be raised on appeal. Plummer v. United States, U.S.App.D.C., No. 14355 (decided October 9, 1958).

raised in the motion for new trial was a legal point concerning the admissibility of the police officer's testimony which was common to both defendants, it was entirely proper that counsel argue the motion in behalf of both. The record reflects active and vigorous representation by appellant's counsel.

Thus it is clear that the motion to vacate was properly denied, having shown nothing but the truth of the axiom "that convicted felons almost unanimously relish the prospect of putting to public judicial test the competence of their erstwhile defenders." *Mitchell* v. *United States,* U.S. App.D.C., No. 14198 (June 12, 1958).

## CONCLUSION

Wherefore it is respectfully submitted that the judgment of the District Court be affirmed.

OLIVER GASCH,
*United States Attorney.*

CARL W. BELCHER,
EDGAR T. BELLINGER,
*Assistant United States Attorneys.*

☆ U. S. GOVERNMENT PRINTING OFFICE: 1958 485790 560